

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON BUSINESS AND LABOR

Call to Order: By **CHAIRMAN DALE MAHLUM**, on January 20, 2003 at 9:02 A.M., in Room 422 Capitol.

ROLL CALL

Members Present:

Sen. Dale Mahlum, Chairman (R)
Sen. Mike Sprague, Vice Chairman (R)
Sen. Sherm Anderson (R)
Sen. Vicki Cocchiarella (D)
Sen. Kelly Gebhardt (R)
Sen. Ken (Kim) Hansen (D)
Sen. Sam Kitzenberg (R)
Sen. Glenn Roush (D)
Sen. Don Ryan (D)
Sen. Carolyn Squires (D)

Members Excused: Sen. Bob Keenan (R)
Sen. Fred Thomas (R)

Members Absent: None.

Staff Present: Sherrie Handel, Committee Secretary
Eddy McClure, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 162, 1/20/2003; SB 198,
1/10/2003
Executive Action: SB 106

{Tape: 1; Side: A}

HEARING ON SB 162

Sponsor: SENATOR ROBERT STORY, SD 12, PARK CITY

Proponents: Pat Melby, Montana Ski Areas Association; Jonathan Vicary, Red Lodge Mountain; George Willett, Showdown Ski Area;

Opponents: None

Informational Witnesses: Don Hoffman, Department of Revenue

Opening Statement by Sponsor:

SEN. ROBERT STORY stated that SB 162 is a bill that goes into the statute on unemployment insurance and was brought to him by the Department of Revenue. He stated that looking at Montana statute, we have a different definition of what are wages and what is federal law. The department's interpretation was that you have no idea what cost of services or wages are; therefore, you need to pay unemployment insurance on the value of no-additional-cost services for ski employees. This bill just aligns Montana's definition of wages with the federal law so you don't have employers who have to deal with different federal and state statutes. He said he had some folks present that would like to testify on the bill. **SEN. STORY** added there was an amendment requested by the department because the bill has a retroactive date in it taken back to the last 2002 package. The department had some concerns with that and he said he would also like to see the date amended, **EXHIBIT(bus11a01)** (SB016201.alh).

Proponents' Testimony:

Mr. Pat Melby, Montana Ski Areas Association, shared his written testimony with the committee, **EXHIBIT(bus11a02)**, along with definitions of no-additional-cost service as defined in the Internal Revenue Service Title 26 Annotated Code, **EXHIBIT(bus11a03)**.

Mr. Jonathon Vicary, Chief Financial Officer of Red Lodge Mountain Resort said the reason Red Lodge Mountain and the Montana Ski Areas Association introduced this bill was they wanted to make the state definition for unemployment insurance taxes consistent with both the state definition of wages and the federal definition for both income tax and unemployment insurance purposes. In his view, this would accomplish several things. It would mean Montana businesses would no longer be required to keep two sets of payroll records. Currently, the cost of compliance with these different definitions exceeds the taxes that are actually paid. It would clear up the confusion within the state

government for the tax laws to be consistently applied to all business and it would make it much easier to conduct business in Montana. The wage definition would be consistent so businesses wouldn't have to go through all kinds of hoops trying to determine the value of something that by definition has no cost to provide. Montana business would no longer be required to keep two sets of payroll records. Red Lodge Mountain had never kept two sets of payroll records until this season, after an audit last summer. After the audit in July of 2002, they will be assessed \$1,080 in additional unemployment insurance tax. He further stated that \$1,080 would not kill his business; however, he had to restructure everything that was done in the ticket department in terms of how they issue the season passes and determining on what days people are using the season passes to ski. Secondly, he had to revamp all the procedures in his accounting and payroll departments and then track all of the information that the ticket department was tracking for them. Thirdly, he had to pay a CPA firm in Billings for their extra work. The total cost to Red Lodge Mountain for the double set of books was between \$5K and \$6K. **Mr. Vicary** read a letter dated December 5, 1994 from the Montana Department of Labor and Industry to **Tim Cramer**, who was the manager of Red Lodge Mountain at the time. It said, "The ski passes are given to employees in order for them to get to their job on the mountain because the passes are given as a necessity to perform their job and not a part of remuneration. The value of the pass would not be reportable as wage." The next letter he read was dated July 16, 2002. It was sent after the audit and was from the Montana Department of Revenue. In it, the auditor determined ski passes and greens fees qualify as wages defined in Montana Code Annotated 39-51-201(22)(a). **Mr. Vicary** stated he has two letters from two different departments in the state of Montana saying the exact opposite thing. He reiterated testimony by **SEN. STORY** and **Mr. Melby** that this bill would make the definition of wages for unemployment tax purposes consistent with Montana's definition of wages for income tax purposes. It would also make it consistent with both the federal definition for income tax purposes and for unemployment tax purposes. **Mr. Vicary** urged the committee to pass the bill, because it would bring the definition of wages into consistency and make it much easier to conduct businesses.

George Willett, Showdown Ski Area, began by stating he runs a small business. This regulation that has suddenly been enacted by the Department of Revenue would just be an additional onerous cost on their business. He encouraged a do pass of the bill.

Opponents' Testimony: None**Questions from Committee Members and Responses:**

SEN. VICKI COCCHIARELLA requested applicability information from the Department of Revenue. **Don Hoffman, Department of Revenue**, stated they picked July 1, 2003 to ensure no one was caught by surprise. His department was not sure if anyone had been paying under this particular provision of the law. They wanted the transition to be as smooth as possible. **SEN. COCCHIARELLA** asked if July 1 is mid-year or was he considering a fiscal year. **Mr. Hoffman** replied that this is just based on quarterly wages.

SEN. DON RYAN questioned **Mr. Melby** regarding the usage of the ski passes. **Mr. Melby** said he didn't know the usage, but they are seasonal employees. **Mr. Willett** shared that their rate is 124 percent because most of their people transition to ranching or other areas. He said they don't have a big unemployment work force working for them.

{Tape: 1; Side: B}

VICE CHAIRMAN MIKE SPRAGUE raised concerns to **Mr. Hoffman** about people losing their appeal for this year and having to pay on the no-additional-cost services even though no one has ever enacted it prior to or plan to ever enact it henceforth. **Mr. Hoffman** confirmed that employers could be held liable for those taxes.

SEN. SPRAGUE stated this is an applicability or policy change. The department, due to the audit or for whatever reason, decided to now apply this process. Nobody changed the law. We just started to enforce it or interpret it or something, but the law never changed. **Mr. Hoffman** agreed with **SEN. SPRAGUE**.

CHAIRMAN DALE MAHLUM asked **Mr. Hoffman** if an employee at ski resort were to go skiing on his day off and pay the going rate, would his department have a problem with it. **Mr. Hoffman** replied that under existing law, it would be the value of the ticket he received keeping in mind the whole purpose of the unemployment insurance is that it's a tax. It is contributions to support benefits that are paid for unemployment, and the tax is trying to match up so that if someone had to receive a benefit, the benefits they would receive would be based upon the wages they received or what they had to replace from their employment if they lost their employment. That's how we get into these kind of angles on these cases--just trying to do that.

Mr. Vicary shared that employers do not pay workers compensation on no-additional-cost services.

Closing by Sponsor:

SEN. STORY closed by stating all of the questions had been answered with the exception of the effective or applicable date. He said he would leave it up to the committee.

HEARING ON SB 198

Sponsor: EMILY STONINGTON, SD 15, Bozeman

Proponents: Mary Sexton, Commissioner of Teton County; Anita Varone, Commissioner of Lewis & Clark County; Gordon Morris, Director of the Association of Counties; and Mona Jamison, attorney representing Gallatin County

Opponents: Mike Strand, CEO of the General Council for Montana Independent Telecommunication Systems; Geoff Feiss, General Manager of the Montana Telecommunication Association; Rick Hayes of Qwest; and Tom Harrison, Montana Cable Telecommunications Association

Informational Witnesses:

John Fitzpatrick, Northwestern Energy

Opening Statement by Sponsor:

SEN. EMILY STONINGTON brought SB 198 forward on behalf of the Montana Association of Counties (MACO). She stated this was a resolution that MACO passed to give counties and county governments a voice in the placement of cell towers. **SEN. STONINGTON** continued on to say we all use our cell phones and want coverage everywhere in the state; however, this bill attempts to give counties in Montana a voice in the placement of those cell towers to protect public safety. Section 1 of the bill began with some definitions that try to define the cell towers themselves and who is providing them. Section 2 covered placement of cell towers in subdivisions and Section 3 was a new section that went into the placement of sites of the cell towers. She said no one would be prohibited from offering cell services, nor was this an attempt to shut down the placement or the utilization of cell towers, nor would there be any preferential treatment given to one carrier over another. However, county

governments could have input and could require permits. Section 4 said cell tower operators need to at least give the county government notification of when it is to happen and then that notification would be passed onto the aeronautics division. That way, if there was a cell tower being proposed, the aeronautics people would have a chance to have a voice in the process. She concluded by saying this bill was never intended to address utility devices that are on telephone poles or power poles that have to do with communications.

Proponents' Testimony:

Mary Sexton, Commissioner of Teton County, explained she was chair of the MACO Information Technology Committee at the time this proposal was created. She went on to give some history of the bill and stated that many counties have ordinances that cover cell towers, although the authority for these ordinances is under question. Under the ordinance section of county statute, they have the ability concerning a speed limit and other issues that concern public health, welfare and safety. But they are not certain the ordinance is specifically authorized for cell towers. She said she knows that in Teton County, they have ordinances with 3 Rivers; in fact, they helped her county write the ordinance so that it would meet their expectations. Another issue that came up recently was the FAA aeronautics issues. There is a requirement these cell towers go through the FAA or the state aeronautics division. She stated their review was not as exacting as it might be and cell towers have been located near airports and could hinder the expansion of those airports. But the aeronautics people have offered to meet with MACO to try and resolve those issues.

{Tape: 2; Side: A}

Ms. Sexton commented on her concerns about the towers and communications entities becoming obsolete. She asked who would take them down and who would make sure they wouldn't remain in place when not in use anymore. She touched on the weed control issue and said that during the permit and notification process, they have the opportunity to talk to the providers to make sure they have a weed plan in place.

Anita Varone, Commissioner of Lewis & Clark County, opened by saying that, while she is a commissioner from Lewis and Clark County, she was born and raised in Yellowstone County. She talked about the intent of the fee language. The intent of the fee language was not to make money, but it was similar to the fees obtained from subdivisions. **Ms. Varone** shared a concern about a situation that happened recently in her county. The cell

tower company requested placement of a tower in the flight path at the airport. She recounted how she called the aeronautics people and found out that, while application is required, the applications regularly received are held in a pile until there are quite a few of them and then they are just signed off. The aeronautics people do not look at them. As a consequence, there is a cell tower at the end of the runway at the Dillon airport.

Gordon Morris, Director of the Association of Counties, spoke to Section 3 of the bill setting forth the siting of wireless communications facilities for county involvement in the process. After going through the positive effects of each section, he said this bill was not coming before the committee from a standpoint of generating revenue, but simply to get a handle on the regulatory placement of cell towers. He urged favorable consideration of the bill.

Mona Jamison, attorney representing Gallatin County, urged strong support of the bill. She directed the committee's attention to page four, lines two through five. She stated that, under federal law, state and local authority cannot prohibit the entry of wireless into the county. They are authorized to impose requirements to protect the public, safety or welfare. As an attorney, **Ms. Jamison** explained that what is within the public safety and welfare is relative to judicial police powers of the state. She said the county cannot say "no," and there are a whole list of things that counties may do, including charging a fee that has to be reasonable. It would be a user fee, and if the counties don't have the ability to charge or set a reasonable fee, then she questioned who would pay for it--the taxpayers or the county. She stated that wireless is growing and it's the communication of the future, if not today, as we leave the traditional communications market. She said it is important that counties have the right to have regulations for public health and safety.

Opponents' Testimony:

Mike Strand, CEO of the General Council for Montana Independent Telecommunication Systems, which represents rural telephone companies and cooperatives operating in Montana. His members provide a wide variety of voice, data, and video telecommunicating services, including wireless services, to the citizens of the state. Therefore, he said, they are simultaneously wire line carriers and wireless carriers for the purpose of this bill. His stated opinion was that SB 198 is contrary to their interests and the interests of their customers. It also represents a serious blow to Montana's ability to grow and compete within the regional and national economies. **Mr.**

Strand pointed out several problems with the definition of wireless telecommunications facilities. He directed the committee's attention to the bottom of page two in Section 1, Sub-Section 12(2) wherein the definition of a wireless telecommunication facility is an unstaffed enclosure for use of the transmission or reception of the telecommunications signal whether by wire, radio frequency, microwave or other signal for communication purposes. He again pointed out that his organization consists of both wireless and wire line carriers. He said that typically telephone wires run through a neighborhood and emanate from a pedestal that is usually mounted on a concrete block. A pedestal could certainly be considered an unstaffed enclosure used for the transmission of a reception-type signal; however, there is nothing wireless about it. His staff installs and maintains the pedestals and other enclosures as well as modifying the equipment in those enclosures. The cost to their customers would be enormous. **Mr. Strand** continued on to share the many different types of wireless devices as defined in III and IV of the bill, which included wireless devices being any type of antenna or antenna support structure. He was concerned about panels the size of a pizza box falling under the umbrella of this bill. Speaking for the telecommunications industry, he was curious to know why the counties have singled out their industry for punishment. They compete with the radio and television broadcasting industries that provide similar services via DSL and high-speed broadband internet connections. They are very concerned about the competitive ramifications of this bill. Once a device has fallen into a category contained in this bill, a minimum waiting period of three weeks for notification would be required from the county before the construction or modification of the defined facility can be completed. In Section 4, Subsection 3, the bill requires a waiting period to be even longer if deadlines exist in county ordinances. So if he wanted to put up a facility to bring high-speed broadband internet access to a rural area that has been starving for it, even if his transmitter is the size of a frisbee and visible only with the aid of a telescope, he and his prospective customers must wait at least three weeks and perhaps longer to install the transmitter. He said that is only one side of the equation. A transmitter is useless without a receiver; therefore, his customers must have receivers in order to receive the signals from his transmitter. If he, as a personal wireless telecommunications carrier, installed that receiver on a customer's phone or business, even if that receiver is the size of a dinner plate or smaller, he must first wait for the notification period and then perhaps pay a fee and get a permit. In Section 5, the bill authorizes the counties to establish permitting processes and fees for those permits. To him, this was the meat of the bill and that it is a money-making business. The financial plight of counties is well documented. **Mr. Strand** stated that, in spite of **Commissioner**

Varone's testimony, there is no limitation to just recovering the costs of the counties administrating this bill's provisions. From his perspective, the effect of this bill would be to slow the deployment of new telecommunications services in some places and stop deployment in others. Capital will go where it always goes ... in places where you can get the best and fastest opportunity for return on investment. It will go to customers that want the service where there are the least problems. He assured the committee that rural Montana is already one of the less attractive markets in the country. He shared his belief that this is a poorly drafted bill.

Geoff Feiss, General Manager of the Montana Telecommunication Association, explained that they represent local phone companies that are both large and small and are commercial and cooperative companies that provide a whole spectrum of services. He reiterated **Mr. Strand's** previous comments starting with the fact that line companies are busy providing and deploying telecommunications infrastructure. It is private industry building and deploying infrastructure that would be vital to Montana's economy. He stated they don't need anymore barriers in the current financial markets. This bill, in their opinion, represents such a barrier. He said this bill is a solution in need of a problem. Gallatin County was a prime example. They have a demand for the services as do any area where there is population growth with an increasing demand for telecommunications service. **Mr. Feiss** explained that another consumer not yet mentioned was public services. Everyone expects to push 911 on our cell phones and get an answer. So they need to put towers where they are needed. He reiterated some of **Mr. Strand's** comments about language in the bill. **Mr. Feiss** summarized his testimony by pointing out that they view this bill as a barrier and shared information about Anne Arundel County in Maryland, which is being sued because of an ordinance they passed. He also said the FCC is aware of this issue and have issued a notice to streamline, not to increase burden of, tower siting facilities.

Rick Hayes of Qwest, rose in opposition to the bill for the same reasons as the previous opponents. He said what it really boils down to, is that in this industry of telecommunications industry, and particularly with cell phone and wireless communications, time is of the essence and the more time spent in hearings, the larger the impediment to the industry. It causes companies to not want to put in their towers or bring their towers to various communities in Montana. He stated it is ironic that when we talk about wanting more and more emergency communications, counties pick and choose where the towers can be located. In essence, he saw this bill stifling the deployment of communications, which he

thought is desperately needed in Montana as technology continues develop.

{Tape: 2; Side: B}

Mr. Hayes spoke of reaching a point of no economic return because they have to spend more time talking about installing cell towers than actually installing them and of building in area codes otherthan 406 if this kind of legislation is passed.

Tom Harrison, Montana Cable Telecommunications Association, expressed their opposition to the bill on the basis of everything that has been said. When he first read the bill, he assumed it was a companion bill to **SEN. TOOLE'S** bill for a dollar a foot on buried lines and was a chance to drive everybody out of the state, but that maybe that wasn't true. It appeared to him that the sales pitch of this bill is the issue of cell towers, yet the whole crux of the bill is the little dish or the little antenna. There are thousands of little dishes and antennas that would be affected if this bill passes. He said electronic technology usually downsizes as it improves and to go through a costly permitting process every time someone wants to do so seems to his organization to be crazy. He stated that if there is some real desire to have this bill impact the large cell towers, then get on with it, but don't impact the consumers and the little providers on very small transitions or change orders which is what the permitting process would do. He wondered about a permitting process that costs more than the item being replaced. They asked that the committee defeat the bill.

Informational Witnesses:

John Fitzpatrick, Northwestern Energy, stated that you wouldn't think of Northwestern as being involved in the telecommunications business, but they own and operate their own inter-company microwave network for communications between sites and also control the sub-stations. He shared two word changes in the bill so that it would be accurate. The proposed amendment should say incorrect utilities rather than inter-utilities communications. On page three the term does not include facilities for inter-utility communications and that should be changed to say intra-utility so we would talk about communication within the company rather than communication between companies.

Questions from Committee Members and Responses:

SEN. SHERM ANDERSON called on **Mr. Morris** and addressed an issue that hadn't yet been established, which was the private property issue if this bill were to proceed and give the counties

authority to look over the process. If that were the case, **SEN. ANDERSON** wanted to know if the counties would be acceptable to an amendment that would state the counties would reimburse that private property owner for the loss of the revenue he wasn't going to get because his site was concluded. **Mr. Morris** thought **SEN. ANDERSON'S** notion that it would constitute takings could be correct. He thought the idea of putting the county in the loop probably would not be acceptable and he thought it would be a matter that would be best left to the courts to determine whether or not a monetary amount would have to be determined. **SEN. ANDERSON** commented that there had been discussion about permitting and permitting fees and his next question was that if this scenario should become a reality, wouldn't that drastically affect the amount of the fee that is charged up front if the county ended up having to pay the fees to the landowners. **Mr. Morris'** answer was the fee would be assessed based upon the administrative costs that are assumed to be incurred by the county and would be limited to that amount. He said they have insurance programs that would provide coverage for a lawsuit being filed over a question of whether or not it constituted the taking. He thought that would be the proper way to proceed. He then discussed the option of the industry posting the notifications in order to keep the process more direct and less cumbersome.

SEN. NORM GEBHARDT commented to **Mr. Feiss** that the industry goes out and notifies people; but, as a county commissioner and active flight instructor, a woman recently stopped by his office at the saw mill and asked if **SEN. GEBHARDT** would like to buy phone service from her. He said he would be interested but wanted to know where she was going to put the tower. She explained it would be installed on a nearby hill. Shortly thereafter, **SEN. GEBHARDT** took a student flying and the cell tower was in the path of the active runway, the only paved runway at Roundup. It was right in the line of the student's flight path. There had been no notification that he knew of to the airport manager. **SEN. GEBHARDT** was chairman of the Board of Directors for the airport as well as County Commissioner in Musselshell County. He asked what was being done to ensure there is reporting to those people involved. **Mr. Feiss** said they notify the FAA when they have to build a tower and they have to comply with FAA regulations when the towers are built.

SEN. KIM HANSEN directed his question to **Mr. Morris** because he still had concerns on Section 5 on permits. He asked how counties come to a determination of what is reasonable. **Mr. Morris** said he tried to calculate the permit fees so counties wouldn't be charging anymore than cost recovery.

After questions from **SEN. GLENN ROUSH** regarding his concerns on the language of the bill covering other items besides cell towers, **SEN. STONINGTON** stated she thought with some amending, she could take care of some of those issues. She expressed her irritation with the telecommunications industry lobbyists for not working with her on this bill. She stated they have known about this bill for two months and she asked them to work with her. They said they might offer a few comments, but it was obvious to **SEN. STONINGTON** they don't want to work with the counties. They sat back and said the worst the bill was drafted, the better off they would be because it would be easier to kill. She thought with some help, they could make it a reasonable bill.

SEN. COCCHIARELLA noted that **SEN. STONINGTON** had signed the draft before it went into a bill and that she also signed the fiscal note. **SEN. COCCHIARELLA** also mentioned that **SEN. STONINGTON** signed the fiscal note, but hadn't heard from anyone how they would address the constitutional issue raised on the fiscal note.

{Tape: 3; Side: A}

CHAIRMAN MAHLUM questioned **Mr. Strand** about cell towers going up. In his area, they need a couple more. When the eastern part of the state opened up mines, they had mine reclamation when it was time for cleanup. He asked what happens when you have a 40 or 50 foot tower and it isn't needed anymore. Who would pay for taking down that tower? **Mr. Strand** replied that his company always takes down old towers as a courtesy.

Closing by Sponsor:

In closing, **SEN. STONINGTON** reiterated that the bill was not intended as it was portrayed. She acknowledged it is an important industry. The bill was merely allowing counties to have a voice in public health, safety and welfare issues in the areas where towers are placed. She thought there could be a balance; but without regulation, cell towers are being erected in inappropriate locations. The counties that have come forward have only asked for a balance. She asked for the committee's permission to design amendments to the bill that can address some of the issues brought forth today.

EXECUTIVE ACTION ON SB 106

{Tape: 3; Side: B}

SEN. ROUSH MOVED DO PASS ON SB 106. SEN. COCCHIARELLA made a SUBSTITUTE MOTION TO INDEFINITELY POSTPONE SB 106. The vote was

7 to 3 in favor of indefinitely posting SB 106 with **SEN. ROUSH**,
SEN. RYAN and **SEN. SQUIRES** voting against it.

ADJOURNMENT

Adjournment: 11:27 A.M.

SEN. DALE MAHLUM, Chairman

SHERRIE HANDEL, Secretary

DM/SH

EXHIBIT (bus11aad)